GRANTED

(5)

Supreme Court, U.S.
FILED
OCT 19 2000
CLERK

No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PETITIONER

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36 pp

QUESTION PRESENTED

Whether a defendant may use 28 U.S.C. § 2255 to challenge his sentence based on a claim that the expired state convictions used to enhance his sentence under the ACCA are constitutionally invalid?

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JURISDICTION

The Ninth Circuit entered its judgment on October 21, 1999; the order denying the petition for rehearing was issued on January 13, 2000. Pet. App. 5. The petition for writ of certiorari was filed on April 12, 2000 and was granted on September 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act of 1984 (ACCA) codified in relevant part at 18 U.S.C. § 924(e)(1) and the relevant portions of 28 U.S.C. § 2255 are reproduced in the Appendix.

STATEMENT OF THE CASE

In December 1993, petitioner Daniels was indicted in the United States District Court for the Central District of California for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). JA 2. The government filed a notice of its intention to seek an enhanced penalty

under the ACCA based on three prior convictions suffered by Daniels in the state of California: a 1978 conviction for robbery, a 1979 conviction for first degree burglary, and a 1981 conviction for robbery. JA 4-5. The ACCA requires a fifteen-year mandatory minimum sentence for any person who is convicted of violating 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. Daniels was convicted following a trial.

Absent application of the ACCA, petitioner's guideline range would have been 84 to 105 months. The district court, however, found that because petitioner had four violent convictions,[1] the ACCA applied, and the applicable guideline range was 188 to 235 months. The court sentenced petitioner to a term of 176 months following a downward departure of 12 months because petitioner had served 12 months in state custody for the identical offense. JA 12-18.

Following affirmance of the sentence on appeal, petitioner filed a motion under 28 U.S.C. § 2255 challenging the 176-month sentence. The motion alleged that two of the four predicate California prior convictions used to enhance his federal sentence had been obtained in violation of the United States Constitution. JA 20-57.

He specifically alleged that the 1978 robbery conviction was invalid because his guilty plea to that offense was not intelligent and voluntary. *Boykin v. Alabama*, 395

[1] In addition to the three predicate felony convictions noticed by the government, the court found that petitioner had been convicted of burglary in 1979.

U.S. 238 (1969). As the only basis for his liability was as an aider and abettor and he had not been advised that he needed to intend the robbery and must have done some affirmative act in furtherance of it, his consequent guilty plea violated due process. JA 37-42.

He challenged his 1981 robbery conviction on that same basis. Additionally, he alleged that the conviction was unconstitutional because he had not received the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, counsel failed to file a potentially meritorious motion to suppress a statement made by petitioner following an arrest that was arguably without probable cause. JA 42-51.

The district court declined to reach the merits of petitioner's claims. Instead, it found that *Custis v. United States*, 511 U.S. 485 (1994) precluded petitioner from collaterally attacking his state robbery convictions on any ground other than that his conviction had been obtained in violation of his right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). Because petitioner had not alleged a *Gideon* violation, the district court denied the motion. JA 58-67.

Petitioner appealed, and the Ninth Circuit Court of Appeals affirmed the district court's denial. The Ninth Circuit read *Custis* to preclude virtually all collateral challenges to prior convictions: "In a § 2255 proceeding, *Custis* bars 'federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim.' " Pet. App. 4 (citation omitted).

SUMMARY OF ARGUMENT

The district court doubled petitioner's firearm possession sentence because there are four California felony convictions on his record. Two of those convictions may have resulted from violations of the Fifth and Sixth Amendments, negating the constitutionality of the resulting federal sentence. Yet, the Ninth Circuit, relying on *Custis*, held that the federal courts are closed to petitioner's claim. That is wrong. A motion under 28 U.S.C. § 2255 to vacate a sentence imposed in violation of the Constitution provides both an appropriate and necessary vehicle for litigating petitioner's claim.

The Court's decisions in *Townsend v. Burke*, 334 U.S. 736 (1948), *Burgett v. Texas*, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972) establish that a sentence based on prior convictions that are materially false violates due process. Although the constitutional defect in those cases stemmed from the lack of counsel, the same principle applies where another constitutional violation renders the conviction "materially untrue." *Townsend*, 334 U.S. at 741. And on collateral review, many courts have vacated sentences that were enhanced by unconstitutional convictions.

Custis did not abrogate this principle. Instead, it extended the right to collaterally challenge unconstitutional prior convictions to the sentencing hearing – if the challenge was based on the denial of counsel. It did not, however, foreclose other constitutional challenges in traditional collateral proceedings, such as habeas corpus. Indeed, *Custis* explicitly noted that alternative forums

were available for constitutional challenges on other than *Gideon* grounds. *Custis*, 511 U.S. at 497.

A motion under section 2255 remains a proper forum for bringing those challenges, particularly where it is the only forum to do so. Where there is no other forum, closing off a section 2255 proceeding virtually ensures that many federal sentences will rest on an unconstitutional foundation. No reason exists for that. Many of the considerations that prompted the *Custis* court to open the sentencing hearing only to *Gideon* challenges are either not present or not as weighty in this context.

First, federal habeas courts are well-qualified to resolve fact-based constitutional challenges, having historically done so in both federal habeas corpus proceedings under 28 U.S.C. §§ 2254 and 2255. Second, unlike the defendant in *Custis*, petitioner's prior convictions are fully expired. The state has a lesser interest in its judgment when all that is at stake is its use as a federal sentencing predicate, and the defendant has received the full measure of the state's punishment for the offense. Finally, whatever remains of the state's interest in the finality of its judgment is outweighed by the possibility (and, in some cases, the virtual certainty) that the Government will imprison persons for many years on the basis of invalid and unconstitutional prior convictions – if no other forum exists to challenge those convictions. Permitting challenges in a 2255 proceeding – where and when those convictions are of consequence – obviates that possibility. That result is both just and workable.

ARGUMENT

PETITIONER MAY CHALLENGE, THROUGH A 28 U.S.C. § 2255 MOTION, THE CONSTITUTIONALITY OF THE PRIOR CONVICTIONS USED TO AUTOMATICALLY INCREASE HIS SENTENCE UNDER THE ACCA

The district court found that Mr. Daniels had suffered four prior California convictions that qualified as predicate felonies under the ACCA. That finding required the court to double petitioner's sentence. In a motion under 28 U.S.C. § 2255 filed after his sentencing, petitioner alleged that two of the four convictions were obtained in violation of the Constitution. That claim, however, has never been adjudicated because both the district court and the Ninth Circuit Court of Appeals, relying on the Court's decision in *Custis v. United States*, 511 U.S. 485 (1994), held that petitioner could not litigate the constitutionality of the prior convictions in a section 2255 motion. This case, then, presents two issues: may an enhanced sentence be founded on an unconstitutional prior conviction and, if not, may the defendant litigate the unconstitutionality of his sentence in a section 2255 motion after sentencing.[2]

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[2] The Circuit Courts have split on the issue. Some disallow such challenges. *See Turner v. United States*, 183 F.3d 474 (6th Cir. 1999); *Ryan v. United States*, 214 F.3d 877 (7th Cir. 2000); and *United States v. Daniels*, 195 F.3d 501 (9th Cir. 1999). Others allow it. *See United States v. Clark*, 203 F.3d 358 (5th Cir. 2000); *Means v. Alabama*, 209 F.3d 1241 (11th Cir. 2000) (petitioner who challenges an expired state sentence used to enhance federal sentence must bring suit under 28 U.S.C. § 2255).

As to the first issue, before *Custis*, the virtually uniform jurisprudence of the Court and the Circuit Courts established that an unconstitutional prior conviction could not be used to support guilt or enhance a sentence. Although some courts have interpreted *Custis* to preclude all collateral challenges (except on *Gideon* grounds) to the constitutionality of prior convictions, they are wrong. *Custis* established the right to challenge prior convictions at sentencing on *Gideon* grounds but did not preclude other constitutional challenges in the appropriate forum. That being so, where the defendant has no other available remedy, a section 2255 motion filed after sentencing provides a proper and sound vehicle to litigate the constitutionality of the prior convictions.

A. The Use of an Unconstitutionally Obtained Prior Conviction to Automatically Increase the Defendant's Sentence Violates the Constitution

1. *Townsend, Burgett* and *Tucker*

In a line of cases beginning with *Townsend v. Burke*, 334 U.S. 736 (1948), the Court has held it violates due process to base a sentence on prior convictions that are materially false. In *Townsend*, the trial court sentenced the defendant, who was appearing without counsel, on the assumption that he had sustained six or seven prior larceny convictions. In fact, at least three of those offenses had not resulted in convictions. The Court vacated the sentence because the defendant, lacking counsel, "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* at 741.

Burgett v. Texas, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972) extended this principle to forbid the use of an unconstitutional prior conviction to enhance a sentence. *Burgett* involved a prosecution under the Texas recidivist statute. In support of an enhanced sentence, the state introduced a certified copy of the defendant's Tennessee conviction. The record failed to show that the defendant had been represented by counsel. That failure created a presumption that the defendant's conviction had been obtained without counsel, a violation of the Sixth and Fourteenth Amendments under *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Court held that admission of the prior conviction tainted by the *Gideon* violation constituted reversible constitutional error. *Burgett* reasoned that the admission of the prior constituted a new constitutional violation: "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or to *enhance punishment for another offense* [citation omitted] is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115 (emphasis added).

The Court reaffirmed this principle – that an unconstitutional prior cannot serve as the predicate for an enhanced sentence – a few years later. In *Tucker*, after the defendant acknowledged at the sentencing hearing that he had sustained three prior felony convictions, the district court sentenced him to the statutory maximum term of 25 years. Several years later, a California court conclusively determined that two of the prior convictions,

from Florida and Louisiana, were constitutionally invalid on *Gideon* grounds. The defendant filed a section 2255 motion attacking his federal conviction and sentence as tainted by the invalid prior convictions.

Tucker affirmed the appellate court's reversal of the defendant's sentence. The Government argued the sentence should be upheld as the unreviewable discretionary act of the trial court. The Court rejected that argument, finding that the sentence was "founded at least in part upon misinformation of constitutional magnitude." 404 U.S. at 592. Had the judge known that two of the prior convictions were unconstitutional, he might have imposed a different sentence. For that reason, the Court remanded for a new sentencing to prevent the "erosion of the *Gideon* principle." 404 U.S. at 593.

Following *Burgett* and *Tucker*, federal courts vacated sentences enhanced by convictions tainted by *Gideon* violations.[3] More tellingly, with the exception of the Third Circuit[4], the other circuit courts relied on *Burgett* and *Tucker* as authority for vacating sentences predicated on prior convictions that were unconstitutional for reasons other than the denial of counsel.[5] This extension naturally

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[3] *See, e.g., Stepheny v. United States*, 516 F.2d 7, 8-9 (4th Cir. 1975) (en banc); *Farrow v. United States*, 580 F.2d 1339, 1344-48 (9th Cir. 1978) (en banc); *Reynolds v. United States*, 528 F.2d 461, 462 (6th Cir. 1976).

[4] The Third Circuit limited *Burgett* and *Tucker* to *Gideon* violations. *United States v. Graves*, 554 F.2d 65, 82 (3d Cir. 1977) (en banc).

[5] *See, e.g., Brown v. United States*, 610 F.2d 672 (9th Cir. 1980) (*Tucker* forbids sentence enhancement by prior convictions

flowed from *Burgett* and *Tucker* because the Court never suggested that its holdings were limited to *Gideon* violations. *Burgett* characterized *Gideon* as "illustrative of the limitations which the Constitution places on state criminal procedure" and noted that the admission of the priors was unconstitutional because it violated a "specific federal right," implying that admission of priors tainted by other specific federal rights would be equally unconstitutional. 389 U.S. at 114, 116. *Tucker* reached its result because the judge considered a prior conviction that had "been unconstitutionally obtained," again placing no limitation on the source of the violation. 404 U.S. at 448. Later, the Court in *Zant v. Stephens*, 462 U.S. 862 (1983) explained *Tucker's* holding as requiring a "sentence be set aside if the court relied at least in part on 'misinformation of constitutional magnitude' *such as* prior uncounseled convictions," suggesting a broader application. *Id.* at 887, n.23 (emphasis added).

Moreover, the rationale of both cases applies equally to other constitutional violations. *Burgett* reasoned that allowing use of the unconstitutional prior denied the right "anew." 389 U.S. at 116. That is equally true where the defendant's prior conviction was procured through another constitutional violation, whether it was an involuntary guilty plea, prosecutorial misconduct, or ineffective assistance of counsel. The defendant suffers a

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tainted by ineffective assistance of counsel); *Stead v. Link*, 540 F.2d 923 (8th Cir. 1976) (*Tucker* forbids sentence enhancement by prior convictions based on involuntary guilty pleas); *United States v. Day*, 949 F.2d 973, 981 (8th Cir. 1991) (same).

renewed violation of those rights when that conviction is used to increase the sentence for a different offense.

Tucker, citing *Townsend*, outlawed the use of an uncounseled prior because it injected misinformation into the sentencing process, a violation of due process. 404 U.S. at 447. On that score, the lack of effective counsel is often indistinguishable from the absence of counsel. The "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). And to prevail on an ineffective assistance of counsel claim, one must ordinarily show that the challenged deficiency had some "effect on the reliability of the trial process." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Thus, just like an uncounseled conviction, a conviction obtained in violation of the defendant's Sixth Amendment right to the effective assistance of counsel lacks the requisite reliability for its unquestioned use to enhance a sentence.

Indeed, the rationale behind recidivist statutes, in general, and the ACCA, in particular, fails if unconstitutional and unreliable prior convictions are used to impose a more severe sentence. "Its [recidivist statute's] primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummel v. Estelle*, 445 U.S. 263, 284 (1980) Thus, to justify sentences that are often

exponentially longer, the prior conviction must reliably indicate a person's propensity to commit crimes.[6] That necessary connection is severed where the prior conviction was unconstitutionally obtained, rendering it of questionable reliability.

Thus, before *Custis*, the almost uniform body of jurisprudence in this country prohibited an inherently unreliable, unconstitutional prior conviction to serve as the foundation for an enhanced sentence. *Custis* did not overturn this principle.

2. *Custis*

In *Custis*, the Court confronted the issue of "whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA." 511 U.S. at 487. The defendant first argued that the statute, 18 U.S.C. § 924(e), should be read to permit collateral attacks on the priors[7] before they could be used at sentencing. The Court rejected that argument. It noted that

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[6] This is particularly true of the ACCA. Congress intended the ACCA to promote public safety by incapacitating those who commit a large number of burglaries and robberies. Congress found that a "small number of repeat offenders commit a highly disproportionate amount of the violent crime." S. Rep. No. 98-190, at 5 (1983). The entire justification for the severe sentence for the relatively less serious offense of weapons possession falls if the prior convictions do not reliably indicate guilt.

[7] The defendant challenged two of his prior convictions. Both were tainted because his counsel had been ineffective. Also, his guilty plea in one had been obtained involuntarily and the other, obtained after a stipulated-facts trial, amounted to an involuntary guilty plea. *Id.* at 488.

where Congress intended to authorize collateral attacks at the time of sentencing, it did so expressly as in 18 U.S.C. § 851(c)(2). That section 924(e) lacked similar language allowed the Court to conclude that Congress did not intend to allow collateral attacks at sentencing. *Id.* at 491-93. As petitioner does not posit section 924(e) as the source of his right to challenge the constitutionality of the predicate priors, that part of *Custis* does not foreclose the argument.

The second argument asserted by the defendant in *Custis* is more germane. He argued that, irrespective of Congressional intent, the Constitution required that he be permitted to attack the validity of the convictions before their use at sentencing, citing *Burgett* and *Tucker*. The Court disagreed, distinguishing *Burgett* and *Tucker*. Both cases involved the failure to appoint counsel in violation of *Gideon*. That failure, the Court reasoned, was a "unique constitutional defect" amounting to a jurisdictional problem and thus could be raised collaterally at sentencing. Other constitutional violations, such as the ineffective assistance of counsel and an involuntary plea of guilty, did not rise to that level. *Id.* at 493-96.

The Court offered two further reasons for distinguishing *Gideon* challenges from other constitutional violations. First, administrative ease supported its holding. *Gideon* violations will generally appear on the face of the record and thus would not necessitate any effort to resolve the claim. Second, "the interest in promoting the

finality of judgments" supported restriction of collateral attacks to *Gideon* challenges. Because the "Constitution does not require such delay and protraction of the *federal sentencing process*," the Court held that the ACCA did not permit the defendant "to use the *federal sentencing forum* to gain review of his state convictions." *Id.* at 497 (emphasis added).

Custis thus extended the right to collaterally challenge prior convictions at the sentencing hearing only to alleged *Gideon* violations. But it did not approve use of unconstitutional prior convictions to impose an enhanced sentence under the ACCA, and it did not bar challenges to those convictions in forums other than the sentencing hearing: "*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity." *Nichols v. United States*, 511 U.S. 738, 765 (1994) (Ginsburg, J., dissenting). That is clear from the plain language of *Custis*.

After stating its holding, the Court noted that because the defendant was still in state custody on his predicate Maryland convictions, he could attack them in Maryland or through federal habeas review. If he succeeded, he could "apply for reopening of any federal sentence enhanced by the state sentences." And although the Court declined to express an opinion on the appropriate disposition of such an application, its recognition of its existence strongly suggested its merit. 511 U.S. at 497. *Custis's* reference to this possibility proves that the Court did not overturn the principle that unconstitutional prior convictions could not be used to increase the length of a sentence. Unless the constitutionality of prior convictions mattered, there would be no need to reopen the federal

sentencing hearing where they were vacated on grounds other than *Gideon*.

In fact, that is the same conclusion reached by every federal circuit court that has considered the issue. "Since *Custis* was decided in 1994, seven other circuits, all that have considered the issue, have also held, or indicated without expressly deciding, that pursuant to federal habeas corpus, a district court may reopen and reduce a federal sentence, once a federal defendant has, in state court, successfully attacked a prior state conviction, previously used in enhancing the federal sentence." *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (collecting cases). Both before and after *Custis*, an unconstitutional prior conviction may not be used to enhance a sentence.

B. The Appropriate Forum For Challenging the Constitutionality of a Predicate Prior That Is Fully Expired Is a Section 2255 Motion

28 U.S.C. § 2255 provides that a "prisoner in custody under the sentence of a court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Petitioner's claim is that the predicate convictions used to sentence him under the ACCA were unconstitutionally obtained. As shown above, if true, the resulting sentence is also unconstitutional, and section 2255 by its express terms lies to remedy a sentence "imposed in violation of the

Constitution" or "otherwise subject to collateral attack." In section 2254 proceedings, the courts recognize that a sentence enhanced by a prior conviction is subject to collateral attack on the ground that the prior conviction is invalid. No reason exists to differentiate section 2255 actions.

And where the prior state convictions used to increase the defendant's federal sentence are fully expired, section 2255 proceedings provide the **only** forum to remedy the unconstitutionality of the enhanced sentence. Petitioner, unlike the defendant in *Custis*, cannot attack his prior convictions in state court[8] or by federal habeas corpus in a 2254 petition. *Maleng v. Cook*, 490 U.S. 488 (1989). If a section 2255 motion is unavailable, the federal courts must necessarily countenance federal sentences that are unconstitutional, having been automatically increased by prior convictions that are unconstitutional and unreliable. *Custis* does not stand for this principle. Where no other forum exists to litigate the constitutionality of the prior convictions, society's interest in assuring that people are sentenced on a constitutional basis outweighs the state's diminished stake in finality and the courts' legitimate concern for efficiency. A section 2255 action provides a viable forum for enforcing that constitutional interest.

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[8] He cannot proceed by state habeas corpus because he is no longer in custody. Coram nobis does not lie in California to challenge errors of law or to raise ineffective assistance of counsel. *People v. Ibanez*, 90 Cal.Rptr.2d 536, 541, 542 n.13 (Cal.Ct.App. 1999).

1. Habeas Courts May Entertain Constitutional Challenges to Prior Convictions Where the Prior Conviction Is the Predicate for a Longer Sentence

Federal courts have jurisdiction under section 2255 to entertain constitutional challenges to the defendant's current sentence. That jurisdiction includes challenges to the constitutionality of any prior conviction that increased the length of the defendant's sentence. This principle, not at issue in *Custis*, follows directly from the Court's decision in *Maleng v. Cook*, 490 U.S. 488 (1989). *Maleng* sanctioned the use of habeas corpus (or in this case a section 2255 motion) to challenge the constitutionality of an expired prior conviction – on grounds other than the denial of counsel – to the extent it is used to enhance a current sentence.

Maleng involved a challenge on federal habeas to the prisoner's 1958 Washington state conviction on the ground that he had not been given a necessary competency hearing. The conviction had fully expired, but it was used to increase the mandatory minimum sentence on the defendant's subsequent 1978 Washington state conviction. The defendant relied on this fact to argue that he was still in custody on the 1958 conviction. The Court rejected that argument, finding that the habeas petitioner was no longer in custody on the 1958 conviction because it had expired. Accordingly, federal habeas did not lie to attack his 1958 conviction. 490 U.S. at 492. The Court did, however, find that he was in custody on the 1978 conviction. It therefore construed his habeas petition as "asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction," cited *Tucker* for the

propriety of such a challenge, and allowed him to proceed.[9]

Following *Maleng*, the Circuit Courts have entertained habeas challenges under 28 U.S.C. § 2254 by state prisoners to the constitutionality of expired convictions when they are used to enhance their current sentences.[10] *See, e.g., Williams v. Edwards*, 195 F.3d 95, 96 (2d Cir. 1999) (petitioner may pursue challenge to constitutionality of expired prior conviction used to enhance current sentence); *Young v. Vaughn*, 83 F.3d 72, 77-78 (3d Cir. 1996) (prisoner may attack current sentence by habeas challenge to constitutionality of expired conviction if conviction used to enhance current sentence); *Dilworth v. Johnson*, 215 F.3d 497, 500 (5th Cir. 2000); *Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994) (same); *Brock v.*

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[9] The Court expressed "no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance." *Id.* at 493. A leading treatise on federal habeas corpus notes the Court's statement pertains to the "question whether, in the process of voiding a current sentence enhanced on the basis of an unconstitutionally imposed prior conviction as to which custody has been terminated, the prior conviction 'itself' may be voided, thus depriving it of other collateral consequences in addition to its effect on the sentence currently being served." James S. Liebman & Randy Hertz, *Federal Habeas Corpus and Procedure* § 8.2c, at 333 n.20 (3d ed. 1998).

[10] On October 10, 2000, the Court granted certiorari in *Lackwanna v. Coss*, No. 99-1884. The question presented by the petition for certiorari was: Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the petitioner is presently in custody?

Weston, 31 F.3d 887, 890 (9th Cir. 1994) (same); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir. 1990) (same); *White v. Butterworth*, 70 F.3d 573, 574 (11th Cir. 1995). *Contra Charlton v. Morris*, 53 F.3d 929, 929 (8th Cir. 1995) (per curiam). And except for the Eighth Circuit, the appellate courts have entertained challenges, on habeas corpus, to the constitutionality of prior convictions on grounds other than the denial of counsel.[11] Congress enacted section 2255 to afford federal prisoners a remedy identical in scope to federal habeas corpus. *Davis v. United States*, 417 U.S. 333, 343 (1974). Section 2255, like section 2254, lies to challenge the constitutionality of predicate prior convictions.

2. Section 2255 Motions Provide a Workable and Necessary Forum to Litigate the Constitutionality of Expired Priors Used to Enhance the Federal Sentence

A section 2255 proceeding must be used in a case like petitioner's, where because the prior conviction is fully expired, its constitutionality cannot be litigated in state court. Provision of a forum by 2255 – where no alternative forum exists – ensures that the current federal sentence has a constitutional foundation. That fact and the normal work of federal habeas courts in resolving fact-

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[11] This is consistent with Justice Souter's view that *Custis* did "not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." 511 U.S. at 512 (Souter, J., dissenting).

intensive issues make a 2255 action a perfect and necessary forum for resolving challenges to the prior conviction. These considerations also distinguish this case from *Custis* and outweigh the countervailing considerations that led *Custis* to permit only *Gideon* challenges at sentencing.

a. Interest in Assuring Constitutional Sentences

In many cases, the prior state convictions will be fully expired. The defendants, having finished their terms, will not be able to challenge the validity of their convictions in state court. Unless a remedy under section 2255 is available, many people may well serve numerous extra years in federal prison without cause. This is because the prior convictions that automatically produce the extra time will be beyond all judicial scrutiny, and any constitutional defect – no matter how egregious – will not be cognizable in federal court. Thus, where the prior conviction was secured by a prosecutor who concealed exculpatory evidence and that violation under *Brady v. Maryland*, 373 U.S. 83 (1963) went undiscovered until the new federal proceeding, the tainted conviction must nonetheless be used to increase the federal sentence. Similarly, where the prior conviction was secured by the use of perjured testimony, *see, e.g. Napue v. Illinois*, 360 U.S. 264 (1959), that conviction must also form the basis of an enhanced sentence. No matter how plain the error, the defendant may not challenge it and the federal court may not correct it – unless section 2255 lies as a remedy.

Further, that the defendant did not obtain correction of the error in state court (or by federal habeas review) does not justify closing the doors to the federal court after that court has used the prior to increase a federal sentence. In some cases, the defendant will not have challenged the conviction before because he was unaware of the basis for a challenge. For example, in some cases of *Brady* error, the suppressed evidence may not have been discovered, perhaps on review by successor counsel, until after the defendant completed his term. And where the prior conviction is tainted by the ineffective assistance of counsel, that same deficit might prevent defendant from intelligently deciding whether to appeal or pursue collateral relief: "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (citation omitted).

Moreover, the defendant may have good reasons for foregoing a challenge at the time of the conviction: "the assumption that a defendant has sufficient incentive to challenge his prior conviction, beyond that inspired by its immediate consequence, seems unwarranted." *Smith*, 25 F.3d at 1368 (7th Cir. 1994). Where little or no additional time was imposed, as the result of concurrent sentences or a plea bargain, the defendant often has little reason to pursue an appeal or collateral attack, irrespective of the potential legal merit of such an attack.[12] Some claims,

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[12] For example, petitioner sustained all the predicate convictions for his ACCA enhancement by 1981 or three years

such as ineffective assistance of counsel or *Brady* errors, must be raised in a collateral proceeding instead of by direct appeal. Since there is no right to counsel on collateral review, *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987), the defendant may forebear meritorious claims, lacking the resources, knowledge and incentive to litigate them. Thus, unless a section 2255 proceeding is available, potentially invalid prior convictions will necessarily increase sentences under the ACCA. That potential, not at issue in *Custis*, makes this case different and changes the balance.

b. Administrative Ease and Burden on the Courts

Another factor that weighs differently here than in *Custis* is the burden on the courts. *Custis* posited the relative ease of resolving *Gideon* challenges, as compared to other constitutional challenges, in support of its decision. The Court noted that a *Gideon* violation would generally appear in the court's record while determination of ineffective assistance of counsel claims and involuntary guilty pleas "would require *sentencing* courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." 511 U.S. at 496 (emphasis added). In contrast to sentencing courts, habeas courts are well-situated to sort

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before the passage of the ACCA. Obviously, his decision whether to appeal or collaterally attack his conviction at that time did not account for the possibility of their subsequent use to enhance his sentence under the ACCA.

through transcripts and conduct the type of fact-intensive inquiry that might be necessary. Federal courts routinely perform that type of inquiry in reviewing 2254 claims. *See, e.g. Smith v. Farley*, 25 F.3d 1363, 1367 (7th Cir. 1994) (limiting review of prior convictions to those which are presumptively void ensures that hearing will not be transformed into a mini-trial concerning their validity when an alternative forum exists for such a fact-intensive inquiry); *United States v. Ricardo*, 78 F.3d 1411, 1415, n.7 (9th Cir. 1996) ("This is a task better suited to state courts of appeal or federal and state habeas courts."). Shifting that inquiry to a habeas proceeding makes good administrative sense and eases the concerns voiced in *Custis*.

Further, the universe of potential attacks on the prior conviction would be more limited in a section 2255 proceeding than at a sentencing hearing. Only those claims that reached constitutional dimensions would be justiciable; claims raising mere procedural irregularities could be summarily dismissed. *Hill v. United States*, 368 U.S. 424, 428 (1962) (section 2255 motion lies to correct only fundamental defects which inherently result in a complete miscarriage of justice or an omission inconsistent with rudimentary demands of fair procedure). Allowing potentially meritorious claims to be litigated in a section 2255 proceeding would not overburden the courts.

In fact, it may well lessen the overall burden. Following their convictions, many defendants forego possible state and federal habeas corpus litigation because there is often insufficient current incentive to pursue it. The litigation might last longer than the term of imprisonment, the perceived benefit might not merit the trouble, or the

low likelihood of success might discourage the undertaking. If, however, that presents the last and final opportunity to challenge a conviction that could later result in a greater term of imprisonment than the person received on the initial conviction, all prisoners would be well-advised to mount every imaginable challenge. Thus, many prisoners would likely file habeas petitions that they would have otherwise foregone.

c. Federalism and Finality

Finality, the last reason offered by *Custis* to bar collateral challenges at sentencing (511 U.S. at 597), also weighs less in a 2255 proceeding challenging the use of an expired conviction. Most of the interests promoted by finality are significantly diminished where the prior conviction is fully expired. In *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court identified a number of values associated with finality. Finality enhances the law's deterrent effect because the defendant finally knows that he will suffer punishment for his misdeeds. Further, when a habeas petitioner succeeds in obtaining a new trial, the passage of time may prejudice the state and diminish the chances of a reliable adjudication. Finally, the "reexamination of state convictions on federal habeas frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 491 (alteration in original) (citations omitted).

Where the defendant's prior conviction is fully expired, he has already received the full measure of the state's punishment for the prior offense. Unlike a challenge while still in custody, he cannot expect or even

hope that he will serve less than his full sentence. Similarly, because the sentence has expired, the state suffers no prejudice if the district court subsequently finds the prior conviction an invalid basis for an increased federal sentence. That action will not affect the state's judgment, and the state will not need to retry the defendant; it only eliminates the conviction's use to enhance a federal sentence. *See e.g., Smith v. Farley*, 25 F.3d 1363, 1368, n.10 (7th Cir. 1994) (federal court may review constitutionality of state prior used to enhance without violating full faith and credit because of the distinction between using an already-served prior conviction as evidence in imposing an enhanced sentence and enforcing that judgment). The federal court's superior interest in assuring the constitutionality of its sentences outweighs the state's interest in its judgment having the force of a federal sentencing predicate.

On balance, provision of a forum by section 2255 makes good common and constitutional sense. Ensuring the constitutionality of a prior conviction, the predicate for an increased sentence, affirms the integrity of the criminal justice system. *Cf. Elkins v. United States*, 364 U.S. 206, 222 (1960) (exclusion in federal trial of evidence illegally seized by state authorities promotes the "imperative of judicial integrity"). Federal courts, conducting section 2255 proceedings, are well-suited for resolving the issues raised by these challenges, and the state's muted interest in finality does not justify sanctioning unconstitutional sentences.

Petitioner long ago completed service of the sentences from his California convictions. Now, however, the

Government has revived those convictions to dramatically increase his current sentence for possession of a firearm. All parties retain an interest in assuring the constitutionality of those convictions. The instant section 2255 proceedings provide a perfect forum to do so. And there is no other. Under these circumstances, he must be permitted to use section 2255 to challenge his current federal sentence that may have been increased by prior convictions that are unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

RELEVANT STATUORY PROVISIONS

18 U.S.C. § 924 Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.